Supreme Court, U.S.
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In The
UNITED STATES SUPREME COURT
October Term, 2000

MARGRET LOWRY, individually and as guardian ad litem of NADINE LOWRY, a minor,

Petitioner,

v.

McDONNELL-DOUGLAS CORPORATION, a California Corporation licensed to do business in California

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX

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I.

QUESTIONS PRESENTED FOR REVIEW

A.

PREAMBLE

The questions are in two (2) categories:

A. This Court has not revisited or provided guidance to the Circuit Courts regarding the "Government Contractor Defense" since its first announcement in Boyle, infra, in 1988. There is now **conflict and confusion** in the lower Courts and the Circuits as to the factual and legal test of the "Government Contractor Defense as expressed by this Court in Boyle v. United Technologies, 487 U.S. 500, 108 S.C. 2510 (1988).

B. The Eighth Circuit's requirement that a Rule 60(b) Motion to correct an error by the District Court must be made within thirty (30) days of such ruling and its not following of this Court's Mandate in Pioneer Investment v. Bruswich Assoc., Ltd. 507 U.S. 380 (1993) as to the Excusable Neglect standard for filing an Notice of Appeal one (1) day late, i.e.

thirty-one (31) days after Entry of Judgment.

B.

QUESTIONS PRESENTED FOR REVIEW

I. GOVERNMENT CONTRACTOR DEFENSE:

1. Since this Court's decision of Boyle v. United Technologies, supra, in 1988, the Circuit Courts have gone in diverse, expanded and conflicting directions in the interpretation and application of "The Government Contractor Defense" i.e. what are the factual criteria and law regarding the following Government Contractor Defense issues:

a. Must the Specific Design Feature be approved under the Government Contractor Defense First (1st) of Three (3) parts test, or is an overall general design approval sufficient conformance?

b. Does **Long Term Use** of the product by the Government after purchase relate back to constitute "approval" of the product per the Government Contractor Defense First, Second and Third part of the test, or is it a Comparative Negligence issue.

c. Are the Reasonably Detailed

Specifications set forth by the Government only "hopes and ambitions for a successful result" or are they the test of the first prong under Boyle, supra.

d. If the Reasonably Precise Specifications are silent as to other warnings allegedly necessary according to State law regarding the design defect, is this then left to the State law criteria to prove liability.

II. RULE 60(b) AND EXCUSABLE NEGLECT:

A. Is it a departure from the accepted and usual course of judicial proceedings for the Eighth Circuit to require that a Rule 60(b) Motion be brought only thirty (30) days after the Order by the District Court to correct error.

B. Is it a departure from this Court's mandate in Pioneer, supra, that the Eighth Circuit, by advisory opinion, did not find Excusable Neglect in the late filing by one (1) day (i.e. thirty-one (31) days after Entry of Judgment) of a Notice of Appeal when:

1. The District Court allowed the late filing Sua Sponte one (1) day late.

2. Petitioner timely moved the District Court per FRCP 4(a)(5) for excusable neglect, was denied as "Moot", since Leave had already been granted to file the Notice of Appeal one (1) day late.

3. Petitioner had received **no Notice of Entry of Judgment** per Rule 77a and as expressed in FRCP 4(a)(6).

4. Petitioner brought a Rule 60(b) Motion to correct the Order of the District Court to find facts of Excusable Neglect within a reasonable time.

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eighth Circuit finally entered in this matter on or about June 8, 2000.

II.

OPINIONS BELOW

On June 19, 1998, United States District Court for the Eastern District of Missouri, Judge E. Richard Webber, granted Respondent's Motion for Summary Judgment and dismissed Petitioner's Complaint. (Appendix (A 6)

The basis of the Order was that the Court found that Respondent had established the First, Second and Third prong of the Government Contractor Defense, Boyle, supra. The Court heavily relied upon (1) post-delivery knowledge gained in Long Term Use of the aircraft as a basis for its opinion (A 15) and (2) continuous back and forth involvement of the Military rather than specific approval

of the defective item in issue. (A 13-14)

Secondly, the Court found that the Government Contractor Defense barred Petitioner's failure to warn claim believing that the only burden on Respondent was to show that a material issue of fact does not exist as to whether the Air Force approved the warnings pertaining to the defect at issue. (A 16-18)

The District Court's granting of Respondent's Motion for Summary Judgment was **entered** on July 24, 1998. (A 24)

No Notice of Entry of Judgment was provided Petitioner's counsel per Rule 77, nor did Respondent provide Notice of Entry of Judgment.

Petitioner filed a Notice of Appeal on July 27, 1998. The District Court wrote on the Notice "Leave to File Granted, 7-29-98, signed by E. Richard Webber". (A 1)

On July 31, 1998 Petitioner brought a Motion to File the Untimely Notice of Appeal alleging Excusable Neglect facts pursuant to Federal Rules of Appellant Procedure 4(a)(5) and facts of 4(a)(6).

(A 3)

District Court Judge Webber wrote on the Motion "Denied as Moot, 8-6-98, E. Richard Webber". (ASA 418) No findings of excusable neglect or good cause were made. (A 3)

The Eighth Circuit Appellant Court docketed the case on August 6, 1998.

Respondent had, pursuant to the United States Eighth Circuit of Appeals, Local Rule 47A(b), fifteen (15) days from the date of docketing of the Appeal to bring a Motion challenging or objecting to "jurisdiction". They did not.

Petitioner's Opening Brief was filed on September 28, 1998.

Respondent brought a Motion on October 13, 1998 (two (2) months after the Appeal was docketed) challenging jurisdiction of the Appellant Court. The Court of Appeals, Eighth Circuit, dismissed the Appeal without explanation on November 10, 1998. Appellant's Motion for Reconsideration was likewise, without comment, denied on December 21, 1998.

On January 19, 1999, Petitioner moved the District Court per Rule 60(b) for

findings of Excusable Neglect for filing of a late Notice of Appeal pursuant to FRAP 4(a)5 and 4(a)6. The District Court found that a FRAP 4(a)(5) Motion had been previously brought, but that a 4(a)(6) Motion had not. This is despite Petitioner raising the issue of lack of Notice in their original Motion. (A 4)

On March 8, 1999, the District Court Granted and found Excusable Neglect for late filing of the Notice of Appeal. (A 26-27)

Petitioner timely filed her Second Notice of Appeal on March 15, 1999 pursuant to said Order. (A 27)

On May 7, 1999 the Eighth Circuit Appellant Court ordered that the Respondent's Motion to Dismiss should be taken with the Appeal for consideration for disposition on the merits. (A 27)

On April 27, 2000 the United States Court of Appeal, for the Eighth Circuit, dismissed Petitioner's Appeal on the grounds that the Rule 60(b) Motion was brought beyond thirty (30) days from the District Court's Denial as Moot of Petitioner's Motion to file late Notice of

Appeal and that the District Court should not have considered Petitioner's Rule 60(b) Motion as being brought beyond thirty (30) days per Fox v. Brewer, 620 F.2d. 177, 180 (8th Cir. 1980). (A 21)

In advisory, the Court further found that there were not sufficent facts constituting Excusable Neglect for filing the Notice of Appeal one (1) day late. (A 32)

Petitioner's timely Petition for Re-Hearing in Banc to the Eighth Circuit Court of Appeals was denied without comment on June 2, 2000.

On June 8, 2000 the United States District Court for the Eastern District of Missouri, filed the Judgment of the United States Court of Appeals for the Eighth Circuit ordering and adjudging that the Judgment of the District Court in that cause was Affirmed in accordance with the opinion of the Court of Appeals. (A 40)

III.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 27, 2000. Petitioner timely petitioned the United States Court

of Appeal for the Eighth Circuit for a Re-Hearing in Banc which was denied on June 2, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

IV.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Constitution of the United States, 7th Amendment, Right to Trial by Jury:

"In suits of common law, where the value in controversy shall exceed $20.00 the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the Rules of the Common Law."

FRCP, Rule 60(b) states,

> "On Motion and upon such terms as are just, the Court may relieve a party or parties legal representative from a final Judgment, Order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or Excusable Neglect;...(6) any other reason justifying relief from the operation of the Judgment. **The Motion shall be**

made within a reasonable time and for reasons (1)...not more than one (1) year after the Judgment, Order or proceeding was entered or taken..."

V.

STATEMENT OF THE CASE

A.

INTRODUCTION

This case involves the crash of a United States Air Force F-15 fighter jet on May 30, 1995 at Spangdahlem Air Force Base, Germany, killing Petitioner's Decedent Major Donald Lowry.

Petitioner's Complaint alleges Negligence and Defective Design on behalf of the widow and child of Decedent Major Lowry against Respondent McDonnell Douglas Corporation.

Respondent brought a Summary Judgment Motion based upon the affirmative defense known as the Government Contractor Defense; Boyle v. United Technologies, 487 U.S. 500, 108 S.C. 2510 (1988).

The lower District Court granted Appellant's Motion for Summary Judgment on June 19, 1998, heavily relying upon "post delivery knowledge" of the defect by a few

members of the United States Air Force and "continuous back and forth" involvement of the Military at the purchasing stage rather than approval of the specific defect at issue. (A 6). Judgment was entered on June 24, 1998. (A 24)

B. FACTS REGARDING THE CRASH, ITS CAUSE AND THE AIR FORCE INVESTIGATION OF THE PRE-CRASH MAINTENANCE

Respondent concedes that the cause of the crash was a cross connection of specific Lateral and Longitudinal Flight Control Input Rods to the Mixer Assembly of Major Lowry's F-15 aircraft done inadvertently during routine maintenance.

These Lateral and Longitudinal flight control input rods to the mixer assembly connect the pilot's control stick to the various flight control surfaces on the wings and tail of the aircraft. If they are not connected in the correct way, the aircraft will be uncontrollable in flight.

The official United States Air Force Mishap Board Investigation concluded that it was generally assumed throughout the Air Force that it was physically impossible to cross connect the flight

control rods.

The maintenance instruction Technical Orders, 1F-1SC-2-27GS00-1, published by Respondent McDonnell, only provides a schematic of the flight control rods and mixer assembly, but provides no step by step instruction regarding connection of the rods.

According to the highly trained level 7 United States Air Force mechanic who cross-connected the rods, he was not aware that these control rods could be cross connected based upon all of his training, knowledge and the Job Guide manuals (which were prepared by Petitioner McDonnell-Douglas).

C. THE DESIGN AND DEVELOPMENT OF THE F-15 AND ITS FLIGHT CONTROL SYSTEM

The critical design of the F-15 aircraft in this case was in two (2) phases.

1. FIRST PHASE

The first phase was the original design of the F-15 A and B model from 1969 to 1972.

The original contract (F33657-70-

C300) states that "performance responsibilities were solely upon the contractor", i.e. McDonnell-Douglas. This contract states that the Air Force was not responsible for what was taking place as far as the design is concerned and the performance of that design.

The Prime Item Development Specification (PID), CP76301A328A081A (the 081A PID) dated December 15, 1969 is the basic Detailed Specification for the F-15 A/B aircraft. It establishes the performance, "design", development and test requirements for the F-15. This is the contemplated "Reasonably Precise Design Specification" required by Boyle, supra.

The "081A PID" specifically requires and incorporates Mil-F-9490C(1) dated 9 March 1966 as the applicable design specification for the Flight Control System which requires "foolproofness" of this design.

The specifically required specifications, MIL-F-9490C, "Flight Control System - Design, installation and test....", at paragraph 3.2.8 states,

> "Fool proofness - All control systems shall be designed so that incorrect assembly and reversed operation of controls is **impossible.**"

Respondent has admitted that this specification was not complied with since it is possible to cross connect the control rods.

The documents presented by the Respondent to the lower Court, did not address the actual defect of "cross connected" rods during the design stages of the F-15 A and B model. The lower Court did not reference any.

There was presented no evidence that the Military approved by waiver or specification any deviance that the control rods could be cross connected, or that they waived any design error, defect or warning that the control rods could be cross connected at the mixer.

Yet, numerous documents presented to the Air Force by Respondent McDonnell-Douglas during the design phase continuously assured the Air Force that the flight control system was safe, conforming to the specifications, that there were no anomalies and no problems

associated with the design of the flight control system.

2. SECOND PHASE

The second phase, applicable to the aircraft in question, began in the late 1970's, through Engineering Change Proposal (ECP) 450, where Respondent McDonnell-Douglas, not the government, was requested to propose, among other things, the incorporation of an additional 2,000 pounds of internal fuel capacity for the F-15, to be called the F-15C. (ASA 327)

Respondent's designed a Left Auxiliary Fuel Tank constructed around the very control rods which were cross connected in this case. The rods now would pass through a tube that was essentially sealed on both ends such that you cannot tell in between whether the rods are crossed or not.

Respondent was also tasked, per the ECP 450, to identify <u>hazards</u> in this design change. Respondent, McDonnell's conclusions and statement to the military was that their Safety Analysis of ECP450 did not reveal any hazards which would significantly degrade the operational

safety of the F-15. They did not address the cross connect problem at all.

Similarly the specific System Safety Analysis done by McDonnell, which had the exact same design criteria for the control system as established by Spec A081A and MIL-F9490C (Impossibility of cross connection), concluded that as far as risk assessment "there is no significant risk associated with this change"

Petitioner's aircraft was delivered to the United States Air Force in the late 1970's.

D. AFTER DELIVERY INCIDENTS OF CROSS CONNECTED FLIGHT CONTROL RODS

Petitioner concedes that there were at least two (2) reported incidents of crossed control rods going to the mixer prior to Major Lowry's crash in this case. One in 1986 and the other in 1991. Both of which did not cause a crash, and both of which were caught by the line mechanics who were flabbergasted that it was possible to so cross connect.

The 1991 High Accident Potential (HAP) Report shows that the Air Force was unfamiliar with the possibility of cross-

connection of the rods. It appears that the Technical Orders were misinterpreted to mean no rigging or operational checks were required after the reinstallation of the same flight control rods as in this crash. The Air Force did not do a fix to this problem until the crash herein.

E. FACTS REGARDING NOTICE OF APPEAL AND RULE 60(b) MOTION

Appellant filed her original Notice of Appeal on July 27, 1998. (A 1)

There had been no Notice of the **Entry** of the District Court's Order granting Motion for Summary Judgment appealed from entered therein on June 24, 1998.

The District Court, granted Petitioner's Leave to File Plaintiff's Notice of Appeal by writing on the Notice "Leave to File Granted, 7-29-98, signed by E. Richard Webber". (A 1)

The case went up on Appeal, was docketed, and Appellant's Opening Brief was filed on September 28, 1998.

The Court of Appeals, dismissed the Appeal without explanation on November 10, 1998, pursuant to Motion by Defendant. Petitioner's Motion for Reconsideration

was denied on December 21, 1998.

Petitioner then immediately on January 19, 1999 brought a Motion in the District Court to relieve Petitioner from Denial as Moot Appellee's Motion to Grant Leave to Extend Time for Filing of Notice of Appeal pursuant and for findings of Excusable Neglect per FRCP 60(b), FRAP 4(a)(5) and 4(a)(6). (A 3)

On March 8, 1999 the District Court found Excusable Neglect for Appellee's filing a late Notice of Appeal, but denied consideration of FRAP 4(a)(6) (lack of Notice of Entry of original Judgment). (A 27)

Appellant's Notice of Appeal was filed in the District Court on March 15, 1999.

On May 7, 1999 the Eighth Circuit Court put the issue of the Motion to Dismiss the Appeal in consideration by the panel to which this case is submitted for disposition on the merits. The Eighth Circuit dismissed the Appeal again and found in advisory, that no excusable neglect was shown. (A 21)

VI.

REASONS FOR GRANTING THE WRIT

A.

THERE IS CONFLICT AND CONFUSION IN THE VARIOUS CIRCUITS REGARDING THE GOVERNMENT CONTRACTOR DEFENSE WHICH THIS COURT HAS NOT REVISITED SINCE ITS ANNOUNCEMENT IN 1988

1. THE CONFUSION OF THE SPECIFIC DESIGN FEATURE WHICH MUST BE APPROVED

The Government Contractor Defense test **(Judicially, not Legislatively enacted)** was first announced in Boyle v. United Technologies, 487 U.S. 500, 108 S.C. 2510, 101 Law. Ed. 2d. 442 (1988) as follows:

> "Liability for design defects and military equipment cannot be imposed, pursuant to State law, when:
>
> 1. The United States approved reasonably precise specifications;
>
> 2. The equipment conformed to those specifications; and
>
> 3. The supplier warned the United States about the dangers in the use of the equipment that

were known to the supplier but not to the United States."

Id. at 512.

Since that first announcement, the various circuits have blurred the first test by ignoring the distinction between the Approval of "Reasonably Precise Specifications" for the particular feature in issue and have adopted an overall "continuous back and forth" review of the general design of the whole product as being sufficient satisfaction of the first test.

Some Circuits state that it is the particular piece at issue that must be approved. See Snell, supra (9th Cir. 1997); Oliver v. Oshgosh Truck, Corp. 96 F.3d. 992, 998-99 (7th Cir. 1996) Cert.Denied 117 S.C. 1246 (1997); Tate v. Boeing Helicopters 55 F.3d. 1150, 1154-55 (6th Cir. 1995); Kleeman v. McDonald-Douglas 890 F. 2d. 698, 701 (4th Cir. 1989) Cert. Denied 495 U.S. 956 (1990).

However, other Circuits state that a "continuous back and forth" review of the overall design is such approval of "Reasonably Precise Specifications" without proof of the specific defective

design being specifically approved. Harduvel v. General Dynamics 878 F.2d. 1311, 1320 (11th Cir. 1989) Cert. Denied 494 U.S. 1030 (1990); Lewis v. Babcock Industries 985 F.2d. 85 (2nd Cir. 1992) Cert. Denied 509 U.S. 924 (1993); Emory v. McDonald Douglas Affirmed 148 F.3d. 347 (4th Cir. 1998)

"General evaluation of the substance of the overall design is sufficent and specific approval of each aspect is unnecessary". Haltiwanger v. Unisys Corp. 949 F.Supp. 898, 905 (D.D.C. 1996).

Other Courts have indicated that "the act of approving reasonable precise specifications" is the act of "examining and agreeing to a detailed description of the working of a system" rather than the specific defect. Smith v. Xerox Corporation 866 F.2d. 135, 138 (5th Cir. 1989)

Overall involvement rather than a showing of approval of the specific design feature is sufficent. See In Re: Air Disaster at Ramstein Air Base 81 F.3d 870-74 (5th Cir. 1996) Cert. Denied 519 U.S. 1028 (1996).

One Court has concluded that a contractor's inability to alter a design once approved is evidence of government acceptance of the design, i.e. approval even if there was no direct approval of the defect in issue. Kleemann v. McDonald Douglas 890 F. 2d 698 (4th Cir. 1989) Cert. Denied 495 U.S. 953 (1990)

Additionally, other Courts have held that "the process of continuous back and forth itself becomes persuasive evidence of product conformity to the precise specifications. Kleeman 890 F.2d. 702; Koutsoubos v. Boeing Vertol, a Division of Boeing Company 755 F.2d. 352, 355 (3d. Cir.) Cert. Denied 474 U.S. 821 (1985), see also Hardival v. General Dynamics 878 F.2d. 1311, 1320 (11th Cir. 1989) Cert. Denied 494 U.S. 1030 (1990); Ramey 874 F.2d. at 950.

One Court went so far to say that the requirement of approval of specific Military Specifications could just be rejected as "representing little more than the hopes of participants that the project in which they are about to embark will turn out well". Kleeman v. McDonald

Douglas Corporation 890 F.2d. 698 (4th Cir. 1989) Cert. Denied 495 U.S. 953 (1990). This Circuit essentially rejects the entire first prong of the Boyle test that there be approval of the Detailed Specifications. In essence that Court has concluded that Boyle, supra, means nothing.

In contrast, it seems Boyle, supra, requires that the exercise of discretion by the military be made in connection with the **particular design feature at issue** in each case.

Only where the military approves reasonably precise specifications is there an exercise of judgment by the Government. Snell v. Bell Helicopter Textron, Inc. (9th Cir. 1997) 107 F. 3d. at page 746, 747.

Logically, involvement of the military with the contractor and with the aircraft as a whole is not relevant to the defense. Boyle, supra, seems to mandate an examination of the involvement by the military in making a **design choice** with respect to the particular component alleged to be defective. Snell, supra;

and Trevino v. General Dynamics Corporation 865 F. 2d. 1474 (5th Cir. 1989)

Here, the District Court believed that one of the considerations under the first element of the Government Contractor Defense is the existence of a "continuous back and forth" review process between the military and the contractor. (A 13-14) However, such consideration should be limited to the back and forth review process regarding the **design in question**. Butler v. Ingalls Shipbuilding, Inc., supra, 89 F.3d at page 585; Tate v. Boeing Helicopter, 55 F.3d 1150, 1154 (6th Cir. 1995). The District Court did not make this distinction.

The lower Courts have gone too far in the application of the Government Contractor Defense merely allowing a broad stroking, broad brushing, government involvement in the purchase of an item rather than approval of the specific design feature and/or **design choice** required by Boyle, supra.

This interpretation is costly, causing lives to be lost and is beyond the

scope of the Boyle contemplated test. This Court must address these issues for guidance to the various circuits.

2. THERE IS CONFUSION IN THE LOWER CIRCUITS IN CONSIDERING LONG TERM USE OF THE PRODUCT AS RELATING BACK TO APPROVAL OF THE DESIGN AT THE PURCHASE STAGE BY THE GOVERNMENT

The District Court here erroneously found that Long Term Use proves conformance and approval of the Detailed Specifications per the First part of the test under Boyle, supra. (A 15-16)

There is conflict and confusion in the Circuit Courts regarding does long term use or knowledge of the defect **after delivery** of the aircraft but prior to the crash, negate any failure to approve reasonably precise specifications, compliance with the Specifications or fail to warn on the part of the Defendant per Boyle, supra.

Several Circuits have concluded the government approval of Reasonably Precise Specifications can be established by the government's continued use of a product

over an extended period of time, particularly after the government is made aware of any alleged defect. Ramey v. Martin Baker Aircraft Company 874 F.2d. 946, 950 (4th Cir. 1989); Lewis v. Babcock Industries, Inc. 985 F.2d 85 (2nd Cir. 1992) Cert. Denied 509 U.S. 924 (1993); Haltawanger 949 F. Supp. 904; In Re: Disaster Ramstein Air Base 81 F.3d. 570, 574 (5th Cir. 1996); Dowd v. Textron 792 F.2d. at 412.

There is conflict and confusion because:

a. Boyle v. United Technologies, supra, specifically did away with long term use as a criteria for any of three (3) prongs of the Boyle, supra, test.

b. Long term use is illogical and contrary to the test enumerated in Boyle, supra, as construing the Government Contractor Defense.

c. There is conflict and confusion in the Circuits since other cases, post-Boyle, have logically not considered long term use as a factor in the analysis of the Government Contractor Defense because it is at the time of the procurement of

the item of manufacture that the defense applies.

d. Other cases uphold long term use, as a basis for granting the Government Contractor Defense per Boyle, supra.

e. Long term use after delivery of the item of manufacture only goes to comparative fault, not "the government made me do it" Boyle, supra, defense applicable.

a. Boyle Specifically Rejects Long Term Use as a Factor In the Government Contractor Defense

The "Long Term Use" argument began with Dowd v. Textron, Inc. 792 F.2d. 409, 412 (4th Cir. 1986) decided before Boyle.

In Dowd, supra, the Court, even though acknowledging that the Government had not approved Reasonably Detailed Specifications of the helicopter rotor system, found that the Army had a Long Term Use and knowledge regarding the system in general constituted approval of alleged design defects.

> "The length and breath of the Army's experience with the 540 rotor system - and its decision to continue using - amply establish Government approval of

the alleged design defect."

In contrast, as stated in Hendrix v. Bell Helicopter, Inc. 634 F.Supp. 1551 (N.D. Texas 1986); also pre-Boyle, supra;

> "The Court finds Appellant's reliance on post-delivery events to be mis-placed...the reason for this is clear. In order for the Government to balance the risks and benefits inherent in the use of the product, the Government must be made aware of any known defects in the product **prior to its intended use of the product."** (emphasis added)

In 1988, Boyle, supra, expressly adopted the policy behind the Discretionary Immunity Exception under the Federal Tort Claims Act. Boyle, supra at page 510, as a "design choice" criteria.

Boyle specifically adopted the requisite element of Government approval of Reasonably Precise Specifications and thus in effect overrules any other "approval" test. See Boyle, supra, page 512.

Boyle, supra is thus specific. It is **at the time of the procurement** that conformance to Reasonably Precise Specification is required, not later.

Anything else, should go to comparative fault or intervening causes. The lower Courts are confused on this issue.

b. Long Term Use Does Not Logically Lend Itself To Any 1 of The 3 Prongs of The Boyle Test

The first prong requires the Approval of Reasonably Precise Specifications. Obviously, long term use does not insure that the government has become aware at the procurement phase of the latent defect which may have caused a particular problem. Therefore, they could not have "approved" it when they "bought" it.

It also clearly does not mean that there has been a "design choice" or an "approval" of the reasonably precise specification when the item was designed, Boyle, supra. Long term use is only use, not design choice.

The second prong, Conformance With the Specifications, likewise does not logically flow from continued use. Continued use by the user of a particular product does not imply that that product has in fact conformed to the original specifications. Other considerations may

require the continued use of the product such as replacement may be expensive, but for which economically the government is stuck. This is not a logical basis to support any government approval of the design relating back. See Lewis, supra.

The third prong, Failure To Warn; long term use by the military does not mean that they have become aware of the latent defect. As Boyle specifically states, at page 512, the warning by the manufacturer is,

> "The 3rd condition is necessary because, in its absence, the displacement of State Tort Law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability."

The point is that just because the Military later became aware of the latent defect, the manufacturer may have already been aware and failed to disclose it at the procurement phase. Men may have died, but the manufacturer remained silent. Thus, fraud on the government for a defective product.

c. There is Conflict and Confusion Since Several Cases Have Denied The Boyle Government Contractor Defense Even When There Has Been Long Term Use

The following cases are examples of conflict and confusion of Long Term Use by the military which has not constituted satisfaction of the Failure to Warn, Third prong of the Boyle test.

Aircraft mechanic who allegedly suffered injuries of being sprayed with hydraulic fluid from a CH-47 Chinook helicopter, Strickland v. Royal Lubricant Company (1995) 91 F.Supp. 1460; Navy divers killed by submarine hatch used for 18 years Trevino v. General Dynamics (5th Cir. 1989) 865 F.2d. 1474; Naval crewman killed in crash of S.3 jet aircraft used since 1975, Gray v. Lockheed (D.C. GA 1995) 880 F.Supp. 1559.

d. Other Cases Accept Long Term Use To Support Granting of the Government Contractor Defense, Boyle, supra.

Dowd, supra, has been mentioned earlier.

Ramey v. Martin Baker Aircraft Company 874 F.2d 946 (4th Cir. 1989). The

Navy was continuing to use a deficient Maintenance Manual while apparently in the process of deciding how to deal with the risk created by the alleged design defect. See 874 F.2d. at 951. The Court's reasoning was that Long Term Use constituted approval of the design defect.

In, Lewis v. Babcock Industries 985 F.2d 83 (2nd Cir. 1993), Long Term Use was held by the Second Circuit as a basis for the approval of Reasonably Precise Specifications at the time of procurement level. In Lewis, supra, the design defect was identified prior to the subject crash, but the Air Force, instead of spending the money to redesign the defect to the ejection seat of the Jet Fighter, decided to change the Maintenance Manuals and replace existing parts. The Second Circuit felt that this decision after the fact by the United States Air Force constituted "approval" at the time of purchase.

In Re: Air Disaster at Ramstine Air Base, 81 F.3d 570, 575 (5th Cir. 1996). The Appeal Court there, at page 575, indicated that the Trial Court had let

evidence in showing that the Air Force had used the C5A aircraft for over 20 years. The Court then said that

> "from this evidence the District Court could have concluded that the C5A was built in accordance with Air Force specifications. See Smith v. Xerox Corp. 866 F.2d 135, 138 (5th Cir. 1989)."

In Haltiwanger v. Unisys Corp., 949 F.Supp. 898 at 903-04 (D.C. 1996), the Court found that the item of manufacture have been used for more that 20 years. It stated,

> "The Postal Service's extended use of the file product manifests its substantive acceptance and approval of the basic and its specific features, thus satisfying the First Prong of the Boyle test, regardless of the nature of the Postal Service's specifications."

Also see, Yeroshefsky v. Unisys Corp. 962 F.Supp 710 (D. MD 1997).

Thus there is conflict and confusion in the Courts as to when an item of manufacture is to be looked at to be in conformance with the specifications. Long Term Use does not and is not actual approval at the procurement or purchasing

time by the Government.

e. Long Term Use Only Goes to Comparative Fault or Intervening Cause

State law and Federal Common Law allow for intervening causes or comparative fault also may be afforded the manufacturer if the military becomes aware of a latent defect and chooses to use it unwisely, or modifies the equipment themselves such that it becomes more dangerous causing injury. There are numerous checks and balances that a Jury could consider regarding what the user, i.e. Military, did with the product after it was in their possession.

3. THERE IS CONFUSION IN THE CIRCUIT COURTS IF RESPONDENT MUST ESTABLISH THE GOVERNMENT CONTRACTOR DEFENSE AGAINST RESPONDENT'S DESIGN DEFECT CLAIM AND RESPONDENT'S FAILURE TO WARN CLAIM INDEPENDENTLY OF EACH OTHER

The Eighth Circuit here is confused that all Respondent McDonnell Douglas must show is that a material issue of fact does not exist as to whether the Air Force approved Warnings pertaining to the Defect

at issue ala Boyle, supra. (A 17) Other Courts are making the same mistake.

The Failure to Warn is a triable issue if warnings are required by State law (per the evidence) and **were not prohibited** under any Government Specification. The Eighth Circuit did not understand that the **absence of specifications for warnings then puts the burden on Respondent to conform to State law regarding warnings in the use of the defective product.**

Under State law a manufacturer has a duty to warn the user of its product of a danger when the manufacturer has knowledge of the danger or a reason to know of it and has no reason to know that those who use the product will realize its dangerous condition. Butler v. Ingalls Shipbuilding, Inc., supra, 89 F.3d at P. 586.

Yet, the military contractor defense is not established as to a failure to warn claim merely by satisfying the subject elements as to a design defect claim. Tate v. Boeing Helicopters, 55 F.3d 1150, 1157 (6th Cir. 1995) Whereas the

government contractor's defense may be used to "trump" a design defect claim, that defense is inapplicable to a failure to warn claim, unless the evidence supports a finding that in making its decision whether to provide a warning against the use of the particular design, the contractor was acting in compliance with Reasonably Precise Specifications imposed on it by the United States. Butler v. Ingalls Shipbuilding, Inc., supra, 89 F.3d at p. 586.

The failure to warn requirements of state law must thus be considered independent of Boyle, supra.

Where the contract with the United States imposes no requirements on the contractor and thus no conflict exists between the contract and a state law duty to warn, Boyle, supra, commands that Courts defer to the imposition of liability under state tort law, regardless of any conflict which may exist between the contract and state law design requirements. Butler v. Ingalls Shipbuilding, Inc., supra, 89 F. 3d at p. 586, quoting In re Joint E.&S. Dist. New

York Asbestos Litig. 897 F. 2d 626, 631 (2d Cir. 1990). This principle simply demonstrates a crucial lack of the necessary conflict between state and federal warning requirements. In re Joint E.&S. Dist. New York Asbestos Litig., 897 F.2d at p. 631. As the Boyle Court pointedly explained, "[C]onflict there must be." Boyle v. United Technologies, supra, 487 U.S. 500. And even a federal contract specification requiring a certain product design does not create a conflict with state law requiring a certain set of warnings incident to the use of that product or design. In re Joint E.&S. Dist. New York Asbestos Litig., 897 F.2d at p. 630.

This Court is asked to clarify and advise regarding this important area of the interpretation of the Government Contractor Defense per Boyle, supra.

RULE 60(b) AND EXCUSABLE NEGLECT

1. THE EIGHTH CIRCUIT HAS DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS REGARDING RULE 60 (b)

FRCP, Rule 60(b) states,

"On Motion and upon such terms as are just, the Court may

> relieve a party or parties legal representative from a final Judgment, Order or proceeding for the followings reasons: (1) mistake, inadvertence, surprise or Excusable Neglect;....(6) any other reason justifying relief from the operation of the Judgment. **The Motion shall be made within a reasonable time and for reasons (1)...not more than one (1) year after the Judgment, Order** or preceding was entered or taken..."

The Eighth Circuit Appellant Court has made a serious misinterpretation in the bringing of a Rule 60(b) Motion by Petitioner LOWRY. The Court reasoned "to prevent its use as a substitute for Appeal we have required a Rule 60(b) Motion alleging judicial inadvertence to be made within the time period allowed for Appeal", i.e. thirty (30) days. (A 28) Presumably referring to the Denial as Moot of the Plaintiff's Motion for a finding of Excusable Neglect. The Court cites Fox v. Brewer 620 F.2d. 177, 180 (8th Cir. 1980). (A 29)

However, in Fox, the "Notice of Appeal" and Motion for extension of time **were filed beyond thirty (30) days** required under FRAP 4(b)(5) against any of

the Judgments sought to be appealed. In that case, the Rule 60(b) Motions were not then timely filed, i.e. the "Notice of Appeal" and Motions to permit the Notice of Appeal were never filed within the thirty (30) days per FRAP 4(b)(5) or 60 days of the Final Judgments sought to be corrected. Fox, supra, page 180.

Here, Petitioner's Notice of Appeal **was** filed on July 27, 1998 (within the sixty (60) day window). (A 1) Also, Petitioner's Motion to permit said filing **was** in fact brought also within the thirty (30) days per FRAP 4(b)(5). (A 3) When the Rule 60 Motion was brought, within one (1) year, it was not to argue or to open up, out of thirty (30) days, **something that had never been done before**. It was in fact correcting a Motion which had been done in the correct thirty (30) day time period as required by the Eighth Circuit.

The Appellant Court here forgot, misconstrued or misapprehended the **in between step** of the Motion having been brought under 4(a)(5) within the thirty (30) day time period of the Granting of Leave to **file what had already been** filed

Notice of Appeal. (A 29)

This Appellant Court's error and misapprehension of the case law has blurred the distinctions between a Rule 60 Motion brought outside of thirty (30) days solely to correct an Order of the District Court on grounds **which had never been brought before** verses, as here, a Rule 60 Motion which relates back to a Motion which had been brought **timely** before, asserting grounds for which relief was appropriate within the thirty (30) day requirement of FRAP 4(b)(5) and 4(b)(6).

The exact purpose of a Rule 60 Motion is to correct whatever manifest errors or inadvertence had actually been prompted by the lower Court, i.e. a Rule 60(b) Motion relating back to a Motion brought within the proper time and relating to the same issues.

Petitioner did bring a Motion in time, after Leave was Granted to and did file her Notice of Appeal, even though Plaintiff's Motion was Denied as Moot. Yet the Eighth Circuit says therefore Petitioner should have appealed it. (A 31) This is incorrect. Cases have always

indicated that the substance of the ruling and the effect of the ruling is the appealable issue, not whether or not it was purely a Denial of a parties' Motion. Parr v. U.S. (1956) 76 S.C. 912, 351 U.S. 513; Rosen v. Rurker (C.A.3d 1990) 905 F.2d. 702, 705, 706.

2. THIS COURT HAS IGNORED THE LACK OF NOTICE OF ENTRY OF THE JUDGMENT, BOTH IN EXCUSABLE NEGLECT AND THE FRAP 4(A)(6) MOTION

The Eighth Circuit further did not take into account the effect the **lack of Notice** of the **Entry** of the original Judgment required by FRCP 77(d), both from the Court and/or from the party.

Federal Rules of Civil Procedure 77(d) states,

> "Immediately upon the Entry of an Order or Judgment the Clerk shall serve a Notice of the Entry by mail upon each party...any party in addition serve a Notice of such Entry in the manner provided in Rule 5 for the Service of papers. Lack of Notice of the Entry by the Clerk does not effect the time to Appeal...except as permitted in Rule 4(a) of the Federal Rules of Appellant Procedure."

The Eighth Circuit Court has ignored the change in FRAP 4(a) instituted in 1991 and reasserted in the Supreme Court case of Pioneer, infra, and the Eighth Circuit case of Fink v. Union Central Life Insurance Company, 65 F.3d. 722 (8th Cir. 1995), regarding certain relaxed standards of allowing late (beyond thirty (30) days) filing of Notice of Appeals. FRAP 4(a)(6) (A 32-38)

Federal Rules of Appellant Procedure 4(a)(6) provides,

> "The District Court, if it finds (a) that a party entitled to Notice of the Entry of Judgment or Order did not receive such Notice from the Clerk or any party within 21 days of its Entry and, (b) that no party would be prejudiced, may, upon Motion filed within 180 days of Entry of the Judgment or Order or within 7 days of receipt of such Notice, whichever is earlier, reopen the time for Appeal for a period of 14 days from the date of Entry of the Order reopening the time for Appeal."

The Eighth Circuit Court of Appeals in its advisory analysis of the finding of Excusable Neglect by the District Court, has set the bar too high. (A 37) A

relaxed standard, especially when there is only a one (1) day late filing of a Notice of Appeal, when there was no Notice of the Entry of Judgment given by either the District Court or the Respondent herein, is appropriate.

This is clearly within the mandates of Pioneer and Fink, supra.

The Court of Appeals has summarily dismissed the lack of Notice of Entry of Judgment as being unimportant and not relating either to the bringing of the Rule 60 Motion and, in its gratuitous finding, that there was no Excusable Neglect.

This Court is asked to reaffirm Pioneer and Fink, supra, and to mandate that the Eighth Circuit not set such a high barrier for the late filing of a Notice of Appeal.

VI.

PRAYER FOR RELIEF

Petitioner respectfully requests to be heard before this honorable Court.

LOUIS S. FRANECKE, ESQ.

VII.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARGARET LOWRY,	)
	) No.: 4-96-CV1572 ERW
Plaintiff,	)
v.	)
McDONNELL-DOUGLAS CORPORATION,	)/s/ Leave to File Granted 7/29/98
	)/s/ E. Richard Webber
Defendant.	)

NOTICE OF APPEAL
(Filed June 27, 1998)

Comes now Plaintiff, Margaret Lowry, and hereby notices her appeal from the judgment of Dismissal per Defendants Motion for Summary Judgment granted and entered herein on June 24, 1998

Dated: 7/27/98

/s/

Louis S. Franecke, Esq.
Attorney for Plaintiff
425 Battery Street
Suite 450
San Francisco, CA 94111
(415) 391-1560 phone

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above and foregoing was sent via United States Postal Service, this 27th day of July, 1998 to:

BRYAN CAVE
Mr. Peter Herzog
211 North Broadway
One Metropolitan Square
St. Louis, MO 63102

/s/

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A 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

MARGRET LOWRY, individually and as guardian ad litem of NADINE LOWRY, a minor,	) No.: 4-96-CV1572 ERW
Plaintiff,	) EX PARTE MOTION BY PLAINTIFF TO FILE NOTICE OF APPEAL PER FEDERAL RULE OF APPELLANT PROCEDURE 4(a)(5)
v.	
McDONNELL-DOUGLAS CORPORATION, a California Corporation licensed to do business in California,	)/s/ DENIED) AS MOOT)8/6/98)/s/)E. Richard) Webber
Defendants.	)

(Filed July 31,1995)

COMES NOW, Plaintiff Margret Lowry, et al., and hereby requests pursuant to Federal Rules of Appellant Procedure 4(a)(5) that the Court extend the time for filing Plaintiff's Notice of Appeal pursuant to said Rule from the Judgment of

Dismissal evidently entered in this Court on June 24, 1998 pursuant to Defendant's Motion for Summary Judgment.

Plaintiff has filed a Notice of Appeal on July 27, 1998 herein (Exhibit 1). Evidently, the Judgment of Dismissal was entered on June 24, 1998 giving, it is believed, until July 24, 1998, or thirty (30) days, for the filing of said Notice per FRAP Rule 4.

However, counsel for Plaintiff, is demonstrating excusable neglect and good cause in that Plaintiff's counsel calculated incorrectly the thirty (30) days, believing that the thirty (30) days did not count the original June 24, 1998 and that thirty (30) days would fall on Saturday July 25, 1998. Under that mis-assumption, Plaintiff's counsel filed Notice of Appeal on Monday, the first available day, July 27, 1998, believing that it was properly within the thirty (30 day Notice of Appeal rule time.

Plaintiff has previously complied with all prior Rules of the District Court, has made timely filings in all respects, and has properly conformed to all of the requirements of this Court.

Additionally, Plaintiff's counsel

also begs the Court that excusable neglect is shown by Plaintiff's counsel's mis-calculation of the time due to the weekend time and the calculations thereto. Plaintiff's counsel is in San Francisco, and has searched his file and does not find any Notice from the Clerk indicating the actual Date of Entry of the Judgment herein. However, Plaintiff's counsel was informed that it was entered on June 24, 1998 and was attempting to proceed thereto.

This case involves a Wrongful Death action of a United States Air Force F-15 pilot in Spangdahlem Germany, leaving a wife and child. There are substantial issues of law and fact raised by the Motion for Summary Judgment pertaining to the Government Contractor Defense as set forth in Boyle v. United Technologies 487 U.S. 500, 108 S.Ct. 2510 (1988), for which direction is needed from the Appellant level regarding the unusual fact pattern involved in this case.

Plaintiff's counsel herein previously argued aforementioned case of Boyle v. United Technologies, supra, before the United States Supreme Court and has an intimate familiarity with the issues which

have been presented since that decision in 1988. The case at bar here will assist the Courts in defining further decisions and should prove to be of economic benefit to the time spent by the Courts in making said future decisions.

Plaintiff begs the Court to grant per FRAP 4(a)(5) said Motion and extend the time of Notice of Entry of Appeal no more than thirty (30) days from Entry of Judgment or ten (10) days from the granting of this Motion as per Plaintiff's already filed Notice of Appeal filed on July 27, 1998.

Dated: July [s] 28, 1998

/s/

LOUIS S. FRANECKE, ESQ.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARGARET LOWRY,	)
	) No.: 4-96-
	) CV1572 ERW
	)
Plaintiff,	)
	)
v.	)
	)
McDONNELL-DOUGLAS CORPORATION,	)
	)
	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

This matter is before the Court on defendant McDonnell Douglas' (MDC) motion for summary judgment. For the reasons given below, the motion is granted.

Plaintiff Margaret Lowry brings this action in diversity alleging defendant MDC defectively designed an F-15 aircraft flown by her husband Major Donald G. Lowry, Jr. She further alleges that MDC failed to warn of any defects associated with the F-15,

I. Facts

This case arises from the crash of an F-15C fighter jet at Spangdahlem Air Base, Germany on May 30, 1995. On that date Major Donald G. Lowry, Jr. was killed during takeoff when the flight control system of his Ff-15 malfunctioned. Prior to the accident, the aircraft had spent twenty days on the ground for maintenance. On May 11, 1995, Air Force mechanics installed a new left auxiliary fuel tank. This necessitated the removal of the flight control rods, devices that control the movement of the F-15's flight control surfaces (ailerons, stabilators and rudders). On May 17, 1995, Air Force mechanics reinstalled the control rods. The parties agree that the control rods were cross-connected during the reinstallation. Cross-connection can result in an inability to control the F-15.

Major Lowry and the mechanics failed to detect the cross-connection before takeoff. After taxiing to the takeoff position, Lowry began to accelerate. Lowry's wingman noticed that when Lowry

attempted to take off, the nose wheel rose approximately six inches but then returned to the ground. Lowry accelerated, and attempted to take off again. The F-15 rolled sharply to the left, turned upside down and crashed. Lowry was killed instantly. The parties agree that the cross-connected control rods caused the accident. [1]

In 1967, the Department of Defense (DoD) issued a request for proposal to MDC and other defense contractors for the design of a tactical aircraft to replace the F-4 Phantom. After a bidding and design competition, DoD awarded MDC the contract to design, develop and test the F-15. MDC has modified the aircraft

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In doing so, the parties rely on the conclusions of the Aircraft Accident Investigation Report prepared by the Air Force. However, opinions of accident investigators as to the cause of, or the factors contributing to, military aircraft accidents occurring after April 21, 993 may not be considered in civil proceedings. 10 U.S.C. Section 2254. Accordingly, the Court has not considered the Report's conclusion in ruling on defendant's motion.

numerous times since the initial award; however, all modifications are subject to Air Force approval.

The Air Force took an active role in the design and production phases of the F-15. The Air Force maintained an office in St. Louis, the place of manufacture. Air Force representatives were present at MDC's facilities on a daily basis to review the design and testing of systems in the F-15. MDC and the Air Force met frequently, and the Air Force reviewed and approved all aspects of the F-15, including the flight control system. Indeed, the Air Force rejected MDC's initial design for the flight control system, insisting on the system used in the F-15 flown by Major Lowry. During the approval process for the flight control system, MC submitted detailed descriptions of the design and operation of the control rod assembly. MDC also submitted testing results of the system to the Air Force. Finally, the Air Force and MDC jointly staffed a System Safety Group that met first semiannually, and later annually, to review safety issues connected with the

emerging design of the F-15.

Plaintiff alleges that the design of the flight control system of the F-15 was defective because it allowed the control rods to be cross-connected. The purpose of the flight control system is to manipulate the surfaces on the F-15 - rudders, ailerons and stabilators - to maneuver the aircraft. The system is composed of a mixer assembly, which translates the pilot's movement of the control stick, and control rods which change the position of the control surfaces. In its initial proposal, MDC envisioned an electronic flight control system, eliminating the need for control rods. However, the Air Force preferred the mechanical system described above.

In the mid-1970's the Air Force ordered MDC to redesign the F-15 to accommodate an additional 2,000 pounds of internal fuel. This design change required that the control rods run through a sealed chamber in an auxiliary fuel tank. Because the control rods run through the auxiliary tank, the rods must be removed during repair or maintenance of

the tank. When repairs are completed, the rods are reinstated. Reinstallation of control rods and maintenance procedures are governed by General Systems Technical Orders, Air Force Technical Orders and technical manuals. The Air Force approved and tested this change using the same process applied to the original design for the F-15.

The Air Force first became aware that removal of the control rods could result in a cross-connection during reinstallation several year prior to Major Lowry's crash. In 1986 and 1991, the Air Force conducted, investigated incidents of cross-connected control rods in F-15's. In both incidents, Air Force personnel noted abnormalities prior to takeoff. The Air Force's investigation of the 1986 incident concluded that "Cross-connecting the rods is an easy mistake to make with the present procedures." (Deft. Ex. G) After these incidents, the Air Force amended its General System Technical Order and its Air Force Technical Order to read: WARNING: Wrong routing of flight control rods could result in loss of life and/or

aircraft." The Air Force also required MC to include these warnings in technical manuals published after 1986. After the 1991 incident, the Air Force conducted a review of the F-15's flight control system. MDC did not participate in the review. The Air Force declined to redesign the flight control system after determining that pre-flight systems checks conducted by maintenance personnel and pilots were sufficient to detect improperly connected control rods.

II. Discussion

The standards applicable to summary judgment motions are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, (1986). The initial burden is placed on the moving party. City of Mt. Pleasant, Iowa v. Associated Elect. Co-op, Inc., 838 F.2d 268, 273 (8th Cir. 1988) (the moving party

has the burden of clearly establishing the nonexistence of any genuine issue of fact that is material to a judgment in its favor). Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and specific fact showing there is a genuine dispute on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Once the burden shifts, the non-moving party may not rest on the allegations in his pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(e). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.574, 586 (1986). This Court is required to view the facts in a light most favorable to the non-moving party, and must give the non-moving party the benefit

of any inference that can logically be drawn from those facts. Matsushita, 475 U.S. at 587; Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983Z). Moreover, this Court is required to resolve all conflicts in favor of the non-moving party. Robert Johnson Grain Co. v. Chemical Interchanger Co., 541 F.2d 207, 210 (8th Cir. 1976). The trial court may not consider the credibility of the witnesses or the weight of the evidence. White v. Pance, 961 F.2d 776, 779 (8th Cir. 1992).

A. Design Defect Claims

MDC contends that it is entitled to summary judgment based on the government contractor defense established in Boyle v. United Technologies Corp., 487 U.S. 500 (1988). In Boyle, the Supreme Court held that military contractors cannot be held liable for design defects if: (1) the government approved reasonably precise specifications; (2) the equipment conformed to those specifications ; and (3) the contractor informed the government of dangers associated with use of the equipment known to it but not the government. Id. at 512. The defense is

an affirmative one; MDC has the burden of establishing it. Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 746 (9th Cir. 1997).

Government approval "requires more than a rubber stamp." Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir.), cert. denied, 493 U.S. 935 (1989). In other words, the contractor must show more than a signature indicating approval of a design. Id. at 1480. Moreover, the contractor must show the government approved reasonably precise specifications for the particular feature at issue, not the entire piece of hardware. Snell, at 747. See also Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 998-99 (7th Cir. 1996), cert. denied, 117 S.Ct. 1246 (1997); Tate v. Boeing Helicopters, 55 F.3d 1150, 1154-55 (6th Cir. 1995); Kleeman v. McDonnell Douglas, 890 F.2d 698, 701 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990). The first condition of the Boyle test is satisfied where the government and the contractor engaged in a "continuous back and forth" review of the design at issue. Harduvel v. General

Dynamics Corp, 878 F.2d 1311, 1320 (11th Cir. 1989), cert. denied, 494 U.S. 1030 (1990).

Here, the government engaged in significant and ongoing oversight of the design of the flight control system of the F-15. Prior to entering the initial F-15 contract, the government rejected MDC's proposed electrical control system, instead requiring that MDC build the F-15 with control rods. The Air Force maintained an office at MDC during the design and manufacturing stages. Air Force personnel testified that they frequently met with MDC aircraft designers regarding the flight control system. MDC submitted the results of tests conducted as to the operation and safety of the flight control system. This evidence establishes the "continuous back and forth" necessary to satisfy the first prong of the Boyle test. Tate, 55 F.3d at 1155. Moreover, the Air Force was aware that the control rods could be cross-connected, and declined to order a redesign of the F-15 after two investigations. Government awareness of a

defect is persuasive evidence of approval of a precise specification. In Re Air Disaster at Ramstein Air Base, 81 F.3d 570, 575 (5th Cir. 1996), cert. denied, 117 S.Ct. 583 (1996); Lewis v. Babcock Indus., Inc., 985 F. 2d 85 (2nd Cir.), cert. denied, 509 U.S. 924 (1993); Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 950 (4th Cir. 1989). The Court finds that MDC has established the first prong of the government contractor defense.

The second prong of the Boyle test requires the contractor to establish that the design conformed to the reasonably precise specifications. A contractor may establish conformity with evidence that the military was "present and actively involved throughout the design, review, development and testing of the [equipment at issue]." Ramstein, 81 F.3d at 575. In Kleeman, the Fourth Circuit explained: "[W]here the procurement process involves this kind of continuous exchange between the contractor and the government, the process itself becomes persuasive evidence of the product conformity to precise specifications." Kleeman, 890 F.2d at

702. The facts here are that the Air Force closely scrutinized the development and testing of the flight control system produced by MDC. In addition, the Air Force required that all F-15's produced by MDC conform to its specifications prior to delivery and payment. The Court finds that MDC has established the second prong of the government contractor defense.

In contesting MDC's ability to establish the second prong of the Boyle test, plaintiff relied on specification MIL-F-9490C 3.2.8, which states: "[a]ll control systems shall be designed so that incorrect assembly and reversed operation of controls is impossible." In Kleeman, the Fourth Circuit found that such a requirement "represent[s] little more than the hopes of participants that the project on which they are about to embark will turn out well." Kleeman, 890 F.2d at 703. The Kleeman court noted that such general requirements often overlap with specific ones, and may serve conflicting purposes. Id. at 703. Such is the case here. The Court finds the requirement contained in MIL-F-9490C 3.2.8 is a general one and

that MDC's failure to comply with it is irrelevant to the government contractor defense in this case.[2]

The third prong of the Boyle test requires that the contractor show that it either informed the government of the dangers inherent in the design, or that the government knew of any dangers associated with the design. Boyle, 487 U.S. at 512; Gray, 125 F.3d at 1379; Ramstein, 81 F.3d at 576. The Court finds that the record does not support plaintiff's contention that MDC failed to warn the Air Force of any dangers associated with the control rod system.

The evidence is that the Air Force was aware of the possibility that control rods could be cross connected during reinstallation. MDC and the Air Force jointly developed and tested the F-15. Air Force publications and manuals

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That the requirement is a general one is revealed by the document itself. MIL-F-9490C is a self-described series of general specifications for piloted aircraft. Nothing in the document purports to apply to the F-15C or its unique flight control system.

informed mechanics that failure to properly reinstall the control-rods could lead to a cross-connection and result in loss of life. Those warnings were first published in 1986, and reestablished in 1993. Air Force personnel charged with managing the flight control system testified at deposition that the Air Force was aware of the possibility of cross connection by 1993, two years before Major Lowry's crash. A showing that the government is aware of all the relevant dangers establishes the third prong of the Boyle test. Tate, 55 F.3d at 1156; Lewis, 985 F.2d at 89-90.

For the reasons given above, the Court finds that MDC has established all three prongs of the Boyle test, and there are no genuine issues of material fact concerning the applicability of the government contractor defense to alleged design defects here. MDC's motion for summary judgment on Courts I & III of the complaint is granted.

MDC next argues that the government contractor defense shields it from liability on plaintiff's failure to warn

claims. Tort law duties to warn serve a different objective than providing information as required under the third prong of the Boyle test. Accordingly, whether the government contractor defense applies to a failure to warn claim requires a separate analysis from a design defect claim Tate, 55 F.3d at 1157. The insulate itself from liability for a failure to warn claim, the contractor must establish:

> (1) the United States exercised it's discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the danger in the equipment's use about which the contractor knew but the United States did not.

Id.

Plaintiff initially argues that Boyle does not apply here because MDC has not presented evidence that the Air Force precluded MDC from including warnings as to the flight control system. This argument misconstrues MDC's burden. MDC must only show that a material issue of fact does not exist as to whether the Air

Force approved warnings pertaining to the defect at issue. Under plaintiff's standard, the government contractor defense would only apply when the military adhered a warning for a piece of hardware. This is contrary to Boyle, which recognized the defense on the theory that a contractor may violate state tort law when it manufactured a product with a defect approved by the government. Boyle, 487 U.S. at 509. This distinction, which plaintiff fails to recognize, is recognized by the cases she relies on. Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582 (9th Cir. 1996); In Re Joint S & E Dist. New York Asbestos Lit., 897 F.2d 626 (1990). Accordingly, the Court rejects plaintiff's argument.

Under the first prong of the Boyle test, MDC must establish that the Air Force exercised discretion and approved warnings. The facts are that the F-15 contract required MDC to produce technical manuals for review by the Air Force. The manuals were completed and delivered after numerous discussions between MDC and the Air Force. Although MDC authored the

initial drafts for the manuals, the Air Force determined the final contents. Any changes to technical orders or manuals, including the addition of warnings, were within the sole discretion of the Air Force. The Court finds the above facts demonstrated the Air Force's discretion and approval over the technical orders and manuals and therefore establishes the first prong of the Boyle test.

The second prong is likewise satisfied. There is no evidence that the warnings contained in the MDC publications did not meet the Air Force's specifications. The evidence clearly demonstrates that the Air Force examined and approved the manuals during the design state. Moreover, after the 1986 incident, the Air Force ordered MDC to add a specific warning regarding possible cross-connection of control rods to the F-15 publications.

Finally, the Court finds that MDC has satisfied the third prong of the Boyle test. To satisfy this prong, MDC must show that it warned the Air Force of any danger in the control rods use of which it

was aware but the Air Force was not. MDC has provided evidence that after the 1986 and 1991 incidents, the Air Force was aware of the potential for cross-connection of control-rods in the F-15. Because MDC did not have superior knowledge, it cannot be held liable in this case. The government contract defense bars the plaintiff's failure to warn claims.

III. **Conclusion**

The Court finds that MDC has shown that a genuine issue of material fact does not exist as to whether the government contractor defense is applicable in this case. Therefore, the Court will grant MDC's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is **GRANTED** (dOC. nO. 34).

A separate judgment in accord with this Memorandum and Order is entered this same date.

Dated this /s/ 19th day of June, 1998.

/s/

E. RICHARD WEBBER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARGARET LOWRY,	
	No.: 4-96-CV1572 ERW
Plaintiff,	
v.	
McDONNELL-DOUGLAS CORPORATION,	
Defendant.	

JUDGMENT
(Entered June 24, 1998)

Pursuant to the memorandum and order entered herein this date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff's complaint is **DISMISSED.**

Dated this /s/ 19th day of June, 1998.

/s/

E. RICHARD WEBBER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1750
No. 99-1805

Margaret Lowry,	*	
	*	Appeal from
Appellant/Cross-Appellee,	*	the United
	*	States
v.	*	District
	*	Court of the
McDonnell Douglas,	*	
Corporation	*	Eastern
	*	District of
Appellee/Cross-Appellant.	*	Missouri

Submitted: January 12, 2000
Filed: April 27, 2000

Before BOWMAN, FLOYD R. GIBSON, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

This case is before us for the second time, on appeal from the order of the

District Court granting summary judgment to McDonnell Douglas Corporation (MDC) on the wrongful death claim of plaintiff Margret Lowry[1]. Lowry alleges that MDC defectively designed and failed to warn of defects in a United States Air Force F-15 aircraft that crashed at Spangdahlem Air Base in Germany on May 30, 1995, killing Major Donald Lowry, plaintiff's decedent. The District Court concluded that MDC was shielded from liability by the federal military contractor defense set forth in Boyle v. United Technologies Corp. 487 U.S. 500 (1988). Lowry filed her first notice of appeal out of time, and the

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1 The original complaint and, as far as we have seen, all documents filed by the parties in this case, including the briefs, spell the plaintiff's first name "Margret." The District Court docketed the case spelling the plaintiff's name "Margaret," and it is the practice of this Court's clerk to use the came caption as the District Court when docketing an appeal, unless advised otherwise. We are not inclined to meddle with the caption sua sponte, absent an indication from lowry that the spelling of her first name has been wrong from the inception of the case.

District Court allowed the defective filing, notwithstanding Lowry's failure to file a motion and made a showing that would justify extending the filing deadline under Federal Rule of Appellate Procedure 4(a). Two days after the notice of appeal was docketed, Lowry did file a motion for an extension under Rule 4(a)(5), but the District Court denied that motion as moot. On MDC's motion, dismissed the first appeal for lack of jurisdiction. As we will explain in more detail, Lowry then filed a motion with the District Court invoking Federal Rule of Civil Procedure 60(b) and seeking relief from the District Court's earlier orders relating to the untimely notice of appeal. The court granted the motion, which ultimately allowed Lowry to timely file another notice of appeal. We have taken with the case MDC's motion to once again dismiss the appeal for lack of jurisdiction, an issue MDC also raises in a cross appeal from the District Court's decision to grant relief from judgment under Rule 60(b). Cf. Karras v. Karras, 16 F.3d 245, 247 (8th Cir. 1994) (per

curiam) (noting that party seeking reversal of district court's failure to grant Rule 60(b) relief should file a notice of appeal from that order). It is to the question of our jurisdiction that we turn first.

I.

In order for us to make our discussion as easy to follow as possible, and to assist the reader in referring back to the pertinent facts and the timing of events, we will forgo further narrative description of the procedural history of the case in favor of a chronological listing, beginning with the District Court's decision to grant summary judgment on its merits.

June 19, 1998 The District Court granted MDC's motion for summary judgment on the merits. Counsel for MDC has represented to this court that he faxed the District Court's order to counsel for Lowry on this date; in fact, the copy of the order in the addendum to Lowry's brief (which she has called "Appendix I") bears a typewritten notation at the top "cc: Lou Franecke [Lowry's counsel] (by fax)

6/19/98" and fax legends showing the document was faxed twice on June 19, once from the District Court and again from the offices of MDC's counsel.

June 24, 1998 Judgment was entered on the District Court docket.

July 24, 1998 The thirty days allowed for filing a timely notice of appeal from the summary judgment, as provided in Federal Rule of Appellate Procedure 4(a), expired.

July 27, 1998 Lowry tendered her notice of appeal to the District Court.

July 29, 1998 Lowry's notice of appeal was filed. On it was handwritten: "Leave to file granted 7/29/98 /s/ E. Richard Webber."

July 31, 1998 Lowry filed a motion styled "Ex Parte Motion by Plaintiff to File Notice of Appeal per Federal Rule of Appellant [sic] Procedure 4(a)(5)." The motion sought an extension of time to file a notice of appeal from the summary

judgment, alleging "excusable [sic] neglect and good cause" for the delay.

August 6, 1998 The District Court denied the "Ex Parte Motion" as moot.

October 13, 1998 MDC filed with the Court of Appeals a motion to dismiss the appeal for lack of jurisdiction. In the motion, MDC argued that Lowry's notice of appeal was untimely, and that the court's notation purporting to grant "leave to file" was not effective to extend the time for filing the notice of appeal, unaccompanied as it was by a Rule 4(a) motion from Lowry and findings by the District Court.

November 10, 1998 This Court granted MDC's motion to dismiss the appeal. That judgment in its entirety, reads as follows: "The motion of appellee for dismissal of the appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b)." This Court's Rule 47A(b) sets out the procedure for filing "a motion to dismiss a docketed appeal on

the ground the appeal is not within the court's jurisdiction."[2]

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2 Lowry makes much of the fact that MDC did not file this initial motion to dismiss within fifteen days after the first appeal was docketed, as provided in Eighth Circuit Rule 47A(b). She did not mention this in her response in opposition to the motion to dismiss, but only in her "motion for reconsideration" filed with this Court. In any even, it is not clear what she would have this panel do about that now. That case is closed and the mandate has issued. Moreover, if there is any question about this Court's jurisdiction, the Court may (and, indeed, it must) sua sponte examine the issue. See Faysound Ltd. v. Falcon Jet Corp. 940 F.2d 339, 341 n.2 (8th Cir. 1991), cert. denied, 502 U.S. 1096 (1992).

Also, and again for the reason that the first appeal is closed, we reject any contention, see Reply Brief of Lowry at 12, that the filing of the first notice of appeal presented "unique circumstances" justifying this Court's assertion of jurisdiction over an otherwise untimely appeal. See Osterneck v. Erns & Whinney, 489 U.S. 169, 179 (1989) (explaining that "unique circumstances" doctrine "applies only where a party has appeal and has received specific assurance by the judicial officer that this act has been properly done"). But see Schwartz v. Pridy, 94 F.3d 453, 456 n.3 (8th Cir. 1996) (noting that "the continued vitality of the doctrine has been questioned").

January 6, 1999 The mandate issued on our judgment dismissing the appeal.

January 19, 1999 Lowry filed in the District Court a document styled "Notice and Motion to Relieve Plaintiffs [sic] from Denial as Moot Motion to Grant Leave to Extend Time for Filing Notice of Appeal (FRCP 60, FRAP 4(a)(5) and 4(a)(6))." In the motion Lowry acknowledged that "[t]he District Court cannot grant untimely Appeals to be filed unless findings that the conditions prescribed by the Rules (FRAP 4(a)(5) or 4(a)(6)) have been satisfied." Notice and Motion at 2. Lowry continued, "By the Judge not designating and finding good cause of [sic] excusable neglect pursuant to Motion, this does not confirm [sic] jurisdiction on the Court of Appeals." Id. at 4.

February 12, 1999 The District Court vacated its order granting leave to file

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This is a defense that could have been successful, if at all, only in response to the motion to dismiss the first appeal.

the untimely notice of appeal. The Court noted that it "incorrectly treated [Lowry's} notice of appeal as a motion for an extension of time"; this was error, the court said, because the notice of appeal was unaccompanied by a motion and a showing of excusable neglect. Order at 3. The court also vacated its order denying as moot Lowry's Rule 4(a)(5) motion. The court gave MDC ten days to respond to the revived 4(a)(5) motion.

Lowry also had argued in her 60(b) motion that she was entitled to relief under Federal Rule of Appellate Procedure 4(a)(6) because she did not receive written notice of the entry of judgment. The District Court declined to address that argument, noting it was not raised in the original 4(a)(5) motion for an extension of time to file a notice of appeal. (The court also denied Lowry's later motion to reconsider that ruling.)

March 8, 1999 The District Court granted Lowry's Rule 4(a)(5) motion, finding the requisite excusable neglect. The court noted that the reasons for the delay were

"within Lowry's counsel's control, [but] do not indicate bad faith so much as carelessness in keeping up with filing deadlines." Order at 5. The court put Lowry on notice that she had ten days to file a new notice of appeal.

March 15, 1999 Lowry timely filed her second notice of appeal from the original summary judgment granted to MDC.

March 29, 1999 MDC filed with this Court yet another motion to dismiss the appeal for lack of jurisdiction, which we ordered taken with the case. As we have said, MDC also raises the jurisdictional issue in a cross appeal from the District Court's decision to grant Lowery's motion for Rule 60(b) relief.

II.

We begin with the question of whether the District Court properly granted Lowry's motion filed under Federal Rule of Civil Procedure 60(b). Rule 60(b) provides, as relevant here, that a district "court may relieve a party...from a final judgment, order, or proceeding

for...mistake." The motion must be filed, however, "within a reasonable time, and...not more than one year after the judgment, order, or proceeding was entered or taken." The District Court determined that is could properly consider Lowry's 60(b) motion filed nearly six months after the orders in question were entered, and then held that the court was mistaken in granting "leave to file" the untimely notice of appeal without a motion from Lowry. The court also held that it erred in denying Lowry's original 4(a)(5) motion as moot, a decision the court made because it had accepted for filing (albeit mistakenly) the defective notice of appeal two days before the 4(a)(5) motion was filed. A court's decision that a movant has shown grounds warranting 60(b) relief is reviewed for abuse of discretion, but "we review the district court's power to entertain [a motion for] relief" in the first instance de novo. Spinar v. South Dakota Bd. of Regents, 769 F.2d 1060, 1062 (8th Cir. 1986). At issue here is not Rule 60(b)(1) mistake by a party, but

mistake by the court.[3] It remains the law in this Circuit that "relief under Rule 60(b)(1) for judicial error other than for judicial inadvertence" is not available. Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980). Assuming without deciding that the mistakes alleged were the result of "judicial inadvertence," the District Court nevertheless should not have considered Lowry's motion for Rule

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MDC misapprehends the District Court's ruling that the court itself, and not Lowry or her counsel, made the Rule 60(b)(1) mistakes, a confusion that creates a blurring of arguments between the two rules at issue in this case. See Brief of McDonnell Douglas Corp. at 26 ("[M]iscounting cannot be considered the type of 'exceptional circumstances' which this Court has deemed necessary to revisit a final judgment."); id at 27 ("[P]laintiff's untimely notice of appeal was attributable solely to her counsel's miscalculation, which does not constitute 'excusable neglect' under Rule 4(a)(5) or 'mistake' under Rule 60(b)."). Had the District Court in fact granted Lowry's 60(b) motion to vacate the judgment based on her counsel's mistake in calculating the time for filing her notice of appeal, we likely would agree with MDC that this is an improper use of Rule 60(b). But that is not what happened here.

60(b) relief because such relief was not timely sought, notwithstanding that the motion was made within the one year specified by the Rule. A 60(b) motion also must be brought within a "reasonable time" and, "[t]o prevent its use as a substitute for appeal, we have required a Rule 60(b) motion alleging judicial inadvertence to be made within the time period allowed for appeal," that is, thirty days from the entry of judgment. Id. This certainly makes sense in this case, as in other cases alleging mistake by the court, where all relevant facts evidencing the court's errors were known as soon as the orders were entered. The argument raised in Lowry's 60(b) motion presents a theory identical to the theory that, in substance, would have formed the basis of Lowry's appeal from the denial of the Rule 4(a)(5) motion.

Although the consequences of enforcing the rule in Fox might seem harsh in this situation, the result cannot be characterized as unfair. It is clear both from Lowry's 4(a)(5) motion and from her later 60(b) motion that she was fully

aware that Rule 4(a)(5) requires a showing of excusable neglect before an extension for filing a notice of appeal can be granted. She even submitted with her 4(a)(5) motion a proposed order purporting to make such a finding. Lowry filed her motion two days **after** the court granted her the very relief that the motion now sought under Rule 4(a)(5)--an extension of time to file her notice of appeal. By filing that motion, Lowry conceded that the court's sua sponte granting of "leave to file" two days earlier was insufficient under the Federal Rules of Appellate Procedure to remedy the defective notice of appeal.[4] Lowry got her extension, but by a procedure that was in violation of

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4 The practice of accepting an untimely notice of appeal for filing without a motion and a showing of excusable neglect was rendered invalid in 1979 when Federal Rule of Appellate Procedure 4 was amended to require a motion. See Campbell v. White, 721 F.2d. 644, 645-46 (8th Cir. 1983) ("We think it clear that the 1979 amendment requires the filing of a motion and that the notice of appeal received after the date for filing notices may not be considered a motion for extension.").

the strictly enforced jurisdictional requirements of Rule 4. Months later, when she filed her 60(b) motion, it was not because she had suddenly learned of facts that were outside the record when the asserted mistakes were made; she was on notice as soon as her 4(a)(5) motion was denied that it was a mistake. Thus she was not relieved of her obligation to promptly challenge the court's failure to enunciate a finding of excusable neglect so as to satisfy this Court's jurisdictional requirements. It was Lowry's responsibility to act diligently in these circumstances, either by asking the District Court to reconsider its ruling or by appealing from that ruling, to see that a 4(a)(5) extension was properly granted and to protect her right to have this Court consider her appeal on the merits. No one prevented her, actually or effectively, from exercising her rights, nor did anyone or anything lull her into thinking the court's actions were beyond challenge.

Additionally, it should be remembered that Lowry sought to reopen a post-

judgment procedural decision, **not** a decision that precluded adjudication on the merits of the case. This is, Lowry "received a ruling on the merits of [her] claim" from the District Court. MIF Realty L.P. v. Rochester Assocs., 92 F.3d 752, 756 (8th Cir. 1996) (noting that court should "balance the policy favoring finality in judgments against the competing policy of granting parties a hearing on the merits of their claims" in case where Rule 60(b) was invoked to set aside dismissal that was entered in anticipation of settlement that was never finalized). Our decision does not deprive Lowry of her day in Court on the substance of her complaint.

The 60(b) motion was, in fact if not in form, Lowry's attempt to be relieved from our conclusion in the first appeal in this case that we had no jurisdiction to hear the appeal. Lowry had no quarrel with the District Court's erroneous procedural rulings until this Court decided it was without jurisdiction; now it is too late. Because Lowry's 60(b) motion was not filed within the thirty

days permitted for filing a notice of appeal from the denial of the 4(a)(5) motion, the District Court erred in considering the 60(b) motion.

III.

Even if the Rule 60(b) motion had been timely filed and properly granted so as to give the District Court the authority to revisit the Rule 4(a)(5) motion, we conclude that the District Court abused its discretion in finding that Lowry had shown excusable neglect. See Metropolitan Fed. Bank v. W.R. Grace & Co., 999 F.2d 1257, 1259 (8th Cir. 1993) (standard of review).

The time limits detailed in Federal Rule of Appellate Procedure 4 for filing a notice of appeal in the district court are "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)). Under the terms of the rule, as relevant here, the district court may extend the time for filing a notice of appeal upon motion by a party made within thirty days of the filing deadline and with a showing

of excusable neglect.[5] See Fed. R. App. P. 4(a)(5). The question here is whether Lowry can demonstrate excusable neglect.

In Fink v. Union Central Life Insurance Co., this Court adopted the

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5 Lowry's motion was styled "Ex Parte Motion by Plaintiff to File Notice of Appeal per Federal Rule of Appellant [sic] Procedure 4(a)(5)." A party may file an ex parte 4(a)(5) motion to extend the time for filing a notice of appeal only if the motion is filed within the time permitted for filing the notice of appeal in the first place, ordinarily (and in this case) thirty days from the date judgment is entered. See Hable v. Pairolero, 915 F.2d 394, 395 (8th Cir. 1990). Lowry's motion was not filed within that period, but it was not ex parte either, as it was served on opposing counsel.

Also, to the extent Lowry may be proposing that we might apply the less stringent "good cause" standard referred to in Rule 4(a)(5) (she mentions it throughout her brief, usually in conjunction with the "excusable neglect" standard), we must reject that suggestion. The good cause standard is applicable only when the party seeking an extension files her 4(a)(5) motion within the thirty-day period allowed for filing a timely notice of appeal, that is, when she is seeking permission to file late rather than forgiveness for having filed late. See Bartunek v. Bubak, 941 F.2d. 726, 728 (8th Cir. 1991).

"more flexible analysis of the excusable neglect standard" set forth in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993), for application to Rule 4(a)(5) cases. Fink, 65 F.3d 722, 724 (8th Cir. 1995). In Pioneer, the Supreme Court "conclude[d] that the determination [of whether neglect is excusable] is at the bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395. The Court found those circumstances to include "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id.

For some reason, MDC opted not to discuss all four of the Pioneer factors, or even to discuss the Pioneer standard at all in its brief, and mentions the case only fleetingly in its motion to dismiss. Instead, MDC's argument focuses only on

the reasons that Lowry gave for failing to file a timely notice of appeal. We will assume, then, that MDC is not claiming that any prejudice will result to the company from granting Lowry's 4(a)(5) motion. Indeed, we discern none, except that final resolution of the case has been postponed. As for the second factor, the delay of one week in filing the original 4(a)(5) motion was minimal. But then it seems that the delay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal. See e.g., Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) ("We do not think it can make a difference that no harm to the appellee has been shown. There is unlikely ever to be harm in the Rule 4(a)(5) setting, because the neglectful appellant has only 30 days after the expiration of his time for appealing in which to request relief."). The delay is more significant, of course,

if we count the months caused by the late filing (and subsequent granting) of Lowry's 60(b) motion. But even taking that delay into account, there is no apparent "impact on judicial proceedings." And there is no record evidence that Lowry did not act in good faith, as that term is generally understood (although we are a bit troubled by the sometimes inconsistent and shifting excuses for the failure to timely file the notice of appeal that appear throughout the record in this case).

That brings us to the fourth factor: Lowry's reason for missing the filing deadline. We think this is key to the analysis. The four Pioneer factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry. We acknowledge, of course, that the Supreme Court has said that neglect need not be "caused by circumstances beyond the control of the movant" to be

excusable, Pioneer 507 U.S. at 392, and that a finding of sufficient innocence on the part of the movant is not a condition precedent to our obligation to consider the other equitable factors, see id. at 395 n. 14. But at the end of the day, the focus must be upon the nature of the neglect. Therefore we must examine carefully the reasons Lowry gave for missing the deadline.

In the original 4(a)(5) "Ex Parte Motion" (filed July 31, 1998), Lowry said that counsel "calculated incorrectly the thirty (30) days, believing that the thirty (30) days did not count the original June 24, 1998 and that thirty (30) days would fall on Saturday July 25, 1998." In fact counsel was correct about the first part; the thirty-day window did **not** begin on the date of entry, June 24, 1998 but on the next day. See Fed.R. App. P. 26(a)(1). Counting thirty days beginning with June 25, 1998, however, still makes the last day for filing a timely notice of appeal July 24, 1998, not July 25. Lowry also claimed in the "Ex Parte Motion" that "excusable neglect is

shown by Plaintiff's counsel's miscalculation of the time due to the weekend time and the calculations thereto." We are not certain exactly what that means, as the rules clearly provide that intermediate weekends are to be counted in the thirty-day computation. See Fed. R. App. P. 26(a)(2). (If the last day for filing, however, falls on a weekend or a legal holiday, that day is not included in the thirty days allowed for filing. See id. 26(a)(3)). In the later-filed "Notice and Motion to Relieve Plaintiffs [sic] from Denial as Moot Motion to Grant Leave to Extend Time for Filing Notice of Appeal (FRCP 60, FRAP 4(a)(5) and 4(a)(6))" (filed January 19, 1999), Lowry further offered that "[a]ny miscalculations on the time was [sic] also compounded by the weekend and the number of days in the month of June." As we have said, it is unclear (and unexplained) why "the weekend" provides an excuse. As for the number of days in June, if Lowry is suggesting that June being a thirty-day month, rather than a thirty-one-day month, three off his calculations, that argument

is specious. If June had thirty-one days instead of thirty, the notice of appeal would have been due one day sooner.

What we have, then, is garden-variety attorney inattention. Although neglect no longer needs to be beyond a party's control to be deemed excusable, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Pioneer, 507 U.S. at 392. Notwithstanding the "flexible" Pioneer standard, experienced counsel's misapplication of clear and unambiguous procedural rules cannot excuse his failure to file a timely notice of appeal. "Here the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable." Prizevoits, 76 F.3d at 134. If we were to apply the excusable neglect standard to require that we deem Lowry's neglect excusable in this case., it is hard to fathom the kind of neglect that we would not deem excusable. See id; see also Advanced Estimating Sys., Inc. v. Riney, 130 F.3d. 996, 998 (11th Cir. 1997)("That

the four-part Pioneer standard for determining excusable neglect applies does not change existing law that a lawyer's misunderstanding of clear law cannot constitute excusable neglect. If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline. We do not believe that the [Supreme] Court intended a practice that would require courts to be that lenient about disobedience to plain law."). The District Court abused its discretion in holding that Lowry demonstrated excusable neglect under Rule 4(a)(5).

We make short work of Lowry's argument that she was entitled to relief under Federal Rule of Appellate Procedure 4(a)(6) because she did not receive notice from the Court or from a party of the entry of judgment. The District Court declined to address the issue because it was not properly raised in her original 4(a)(5) motion, and we see no error in that conclusion. Moreover, even if we were to consider the question and to

accept the assertion that Lowry did not receive written notice of the entry of judgment, she acknowledged in her 4(a)(5) motion that "counsel was informed that [judgment] was entered on June 24, 1998 and was attempting to proceed thereto." Thus Lowry had actual notice of the entry of judgment, if in fact she did not receive written notice. Further, it was Lowery's responsibility to check the docket for entry of judgment, particularly when she knew on June 19, 1998, that the District Court had signed an order granting summary judgment to MDC. See Zimmer St. Louis, Inc. v. Zimmer Co., 32 F.3d 357, 361 (8th Cir. 1994).

In sum, then, we hold that the District Court was without authority to consider Lowry's 60(b) motion to "undo" the court's denial of her original 4(a)(5) motion. In any case, Lowry cannot demonstrate that her neglect was "excusable" so as to entitle her to an extension of time to file her notice of appeal. The timely filing of a notice of appeal being mandatory and jurisdictional, we dismiss the appeal and decline to

address the merits in what could only be an advisory opinion. See id..

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHT CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1750EMSL

No. 99-1805EMSL

Margaret Lowry,	*	
	*	4:96CV1572ERW
	*	/s/
Appellant/Cross-Appellee,	*	
	*	Appeal from the
v.	*	United States
	*	District Court
McDonnell Douglas, Corporation	*	for the Eastern
	*	District of
	*	Missouri
Appellee/Cross-Appellant.	*	

JUDGMENT

(Filed June 8, 2000)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

April 27, 2000

A true copy

ATTEST: /s/ Michael E. Gans

CLERK, U.S COURT OF APPEALS,

EIGHTH CIRCUIT.

MANDATE ISSUED JUN 9 2000